Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

INITIAL COMMENTS OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

David R. Conn
Deputy General Counsel
(319) 790-7055

Daniel M. Lipschultz
Assistant General Counsel
(952) 252-5002

McLeodUSA Telecommunications Services, Inc.
6400 C St. SW
Cedar Rapids, IA 52406-3177

Attorneys for
McLeodUSA Telecommunications Services, Inc.

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SUMMARY

The primary hallmark of the competitive industry over the last 6 years has been regulatory uncertainty caused by an unending series of appeals and remands of various FCC orders. The competitive industry requires a period of stability in the underlying ground rules, to allow all carriers to understand their obligations and to allow regulators an opportunity to determine appropriate enforcement mechanism for those obligations. As a result, the Commission should not consider major changes to the current rules at this time.

INTRODUCTION

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), an integrated communications provider with its headquarters in Cedar Rapids, IA, currently provides competitive local exchange service to over 450,000 customers located throughout its 25-state core service footprint. Over half of McLeodUSA's customers are residential customers, and the vast majority of the remainder are small businesses, with an average of between 4 and 5 lines. McLeodUSA serves these customers using a combination of resale, unbundled network elements, and its own facilities (including, in very limited areas, its own loop facilities).

McLeodUSA has been providing competitive local telecommunications services since 1994, and probably has as much or more experience with such services as any other competitive carrier. The continued availability of UNEs is absolutely critical to McLeodUSA's ability to provide competitive local services to its customers. With that fact in mind, McLeodUSA submits these comments in response to the Notice of Proposed Rulemaking issued in this docket on December 20, 2001.[1]

I. NPRM Section III.A – Threshold Statutory Analysis

It is important at the outset for the Commission to keep firmly in mind the level of regulatory uncertainty that competitive providers have faced for the past 6 years. The tale of FCC orders, and appeals of FCC orders, is adequately chronicled in the NPRM; but the implications of those proceedings on competitive providers (who must function in the real world of business plans, financial constraints, and customer demands) bear consideration. It was not until the *UNE Remand Order* at the end of 1999 -- almost four years after the Act became law -- that the FCC was finally able to determine what UNEs would be actually be available to competitors. For an additional six months after that, the available of EELs was in doubt (and is indeed still subject to dispute). The available of unbundled local switching, although currently required in most situations, has been uncertain even after the *UNE Remand Order*, as some RBOCs have worked tenaciously to restrict its availability beyond the Commission's own

[1] Hereinafter, "NPRM".

current restrictions. Additional restrictions (or elimination) have also been proposed for high-capacity loops and unbundled transport. And even now, over six years after the Act became law, competitive providers still do not know whether the rules which determine the prices they pay for network elements are constitutional.

Thus, for the past six years, competitive providers have been attempting to execute their business plans and bring competition to entrenched monopoly markets in the face of ground rules which have been both uncertain and ever-shifting. Certain RBOCs have been the major causes of this uncertainty, and RBOCs have also been the primary beneficiaries: the latest data from the Commission shows that growth in lines served by competitive providers plummeted between the first half of 2000 and the first half of 2001.[2] What the competitive industry needs currently is a stable regulatory environment in which all players understand the ground rules, and regulatory bodies understand enforcement procedures for those ground rules. Substantial changes to definitions of what network elements are available to competitors – something which is at the very heart of the competitive industry – will only serve to further delay the introduction of competition to local exchange markets.

As the Commission notes in the NPRM, the *UNE Remand Order*[3] contained a discussion and delineation of the way in which the statutory "necessary" and "impair" standards found at 47 U.S.C. Sec. 251(d)(2) would be applied. In determining whether these standards are met, the rules adopted by the Commission require an examination of whether a requesting carrier's ability to provide the services it seeks to provide would be materially diminished by lack of access to a

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2 *Local Telephone Competition: Status as of June 30, 2001.* Industry Analysis Division, Common Carrier Bureau, February 2002. Table 1 shows that lines served by competitors grew by about 41% during the first half of 2000; by about 28% during the second half of 2000; and by about 16% during the first half of 2001.

network element, and provide for consideration of factors of cost, timeliness, quality, ubiquity, and operational issues in making this determination. McLeodUSA believes that these existing rules capture precisely the relevant considerations, and need no modification.

The Commission, however, asks in the NPRM whether it should give more or less weight to certain of these factors, and in particular whether "cost should be afforded less weight than other factors."[4] This question is raised in the context of language contained in the Supreme Court's decision in *Iowa Utilities Board*.[5] That language, however, does not support the inference that cost should be given less consideration than other elements. The Supreme Court's decision on this point merely stated that a minor increase in cost could not logically be considered to impair the ability of a carrier to offer services.[6] The Commission, however, has already addressed this issue by requiring that <u>any</u> of the factors considered must result in a <u>materially diminished</u> capacity to provide the service in question. There is no indication in the Supreme Court's order that cost considerations are to be given some inferior status, if those considerations do actually impair a carrier's ability to provide services. In fact, such a conclusion would be nonsensical: It would require that UNEs be made available based on whether lack of the UNE would impair the requesting carrier, unless the impairment resulted from increased costs to the requesting carrier, in which case impairment would be allowed. There is nothing in the statutory language that indicates impairment is to be ignored as long as the impairment is based on the costs resulting from UNE unavailability. In fact, the effect of

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[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*)

[4] NPRM, Par. 19.

[5] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90, 119 S. Ct. 721, 725, 142 L. Ed. 2d (1999).

[6] *Id.*

"impairment" on end-users – denial of competitive service options -- is the same, regardless of whether the impairment results from increased costs or from some other factor.

II. NPRM Section III.B – "At a Minimum" Statutory Analysis

McLeodUSA believes that the *UNE Remand Order* adequately sets forth the factors that need to be considered in addition to the "necessary" and "impair" standards.[7] It is important, however, that those standards be correctly applied by the Commission. In particular, the Commission should recognize that there is no tension between the standards regarding the definition of UNEs and the policy set forth in Section 706 of the Telecommunications Act regarding encouragement of deployment of advanced services. In fact, the goals of Section 706 can best be achieved through the maintenance of existing UNE unbundling requirements.

This position is based on McLeodUSA's belief that deployment of advanced services will be best achieved through a vibrantly competitive telecommunications market. History tells us this is the case: One need only look at the failure of RBOCs in general to effectively introduce and market ISDN services, even before any cost-effective alternatives (such as DSL) were available. Further confirmation is found in the case of DSL itself, where the RBOCs were generally prodded into action only by the existence of competitive DSL providers. In short, we should not expect rapid introduction of advanced services in the context of a market framework in which competitors must tenuously cling to survival.

Unfortunately, such a market framework is precisely what some RBOCs are advocating to the Commission. The idea that a ubiquitous network can be arbitrarily partitioned such that an element performing "function A" using "technology X" is unbundled, while another element

[7] NPRM Par. 21.

performing the same "function A" but using "technology Y" is not unbundled, is nothing more than a futile intellectual exercise conducted with the purpose of so confusing the market that effective competition becomes impossible. Similarly, issues related to exemption from unbundling obligations for "new" network construction[8] make little sense in the context of real-world networks. Perhaps a case could be made for exempting from unbundling obligations a wholly new network which neither touched nor used any piece of the existing network. But no party is constructing, or intends to construct, such a network. Instead, what is being advocated is that "newly constructed" pieces of the existing network be exempted from unbundling. Such a policy would provide incumbent carriers with a perfect mechanism to engineer their networks in a way that allowed them to "hide" customers from competitors by installing "exempt" facilities in the network serving the customer. Because all customer services are typically provided over a common network, such a policy would place competitors in an untenable position.

Even if such an exemption from unbundling were appropriate from an engineering perspective, however, it would be wholly unacceptable in real-world applications. In the face of an unbundling exemption for new facilities, it is assured that RBOCs will tell customers that if the customer switches to a competitive provider they will have to make do with "old, outmoded" facilities; but the customer can make use of the best and newest facilities if they remain with the RBOC. On top of the inherent difficulties faced by competitors with gaining share in existing monopoly markets, this impediment could be fatal.

Perhaps the time will come in the future when such an exemption is appropriate: when alternative facilities are widely in place and a substantial share of services are provided over facilities other than those of the RBOC. That is not the situation currently, and the Commission

[8] NPRM Par. 24.

should not attempt bifurcate unbundling requirements on the basis of technology or installation dates.

III. NPRM Section III.E – The Role of the States

Clearly, states must be involved in the process of determining the future of UNE availability within their state. At the outset of the process, when few customers were served by competitive providers, it made sense for a national standard to be established. Now, as the number of lines served by competitors has grown to over 17 million, states have a substantial interest in ensuring that customers in their state have continued access to competitive providers.

There are a multitude of mechanisms that could be devised to allow state regulators to play this role. The minimum element that must be contained in any of them, however, is this: The state must be able to provide for continued availability of a UNE in the state, if that UNE is being used to provide service to customers in the state. This will allow state regulators to protect competitive services to customers in the state, even if federal UNEs lists are modified. Of course, states need be limited to this role; but in no event should their role be reduced below this level.

CONCLUSION

For the reasons stated herein, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), requests that the Commission make no major modifications to the definition of available UNEs at the current time.

Respectfully submitted,

MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC.

By: ______________________________
David R. Conn
Deputy General Counsel

By: ______________________________
Daniel M. Lipschultz
Assistant General Counsel

McLeodUSA Telecommunications Services, Inc.
6400 C St. SW
Cedar Rapids, IA 52406-3177

Attorneys for
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